

[FILED 04-30-93]

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF VIRGINIA  
AT ROANOKE

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. CR-92-90-R
	:	
JAMES F. WOODS;	:	Judge Jackson L. Kiser
JAMES L. GARNER, SR.; and	:	
EDGAR J. DOBBINS,	:	
	:	
Defendants.	:	

MEMORANDUM OF THE UNITED  
STATES REGARDING THE ADMISSION OF  
OTHER ACTS EVIDENCE PURSUANT TO RULE 404(b)

The United States has notified the defendants that it intends to introduce at trial evidence of other acts pursuant to Rule 404(b) of the Federal Rules of Evidence. The United States hereby submits the following materials and authorities in support of the use of such evidence at trial.

The admission of other acts evidence is governed by Rule 404(b) of the Federal Rules of Evidence ("Rule 404(b)"), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Crim. P. 404(b).

In the instant case, the United States intends to offer evidence of other acts to prove that the individual defendants had the requisite intent to commit the offense with which each is charged, to prove that the defendants knowingly entered into the charged conspiracy, to establish that the participation in the charged conspiracy by the defendants was not the result of accident or mistake, to establish a pattern of conduct indicative of a common plan or scheme in which the defendants were engaged, and to explain the background and development of the charged conspiracy.

I

APPLICABLE LAW

A. Other Acts Evidence Must Be  
Probative Of An Issue Other Than Character

Evidence of other acts committed by the defendants is admissible at trial if the evidence serves a permissible purpose such as those articulated in Rule 404(b) and the probative value of that evidence outweighs its potential prejudicial effect. United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 530 (4th Cir. 1985), cert. denied, 474 U.S. 1005 (1985). In order to be admissible under Rule 404(b), other acts evidence must be relevant for a purpose other than showing the character or criminal disposition of the defendants. Huddleston v. United States, 485 U.S. 681, 686 (1988). See United States v. Tate, 715 F.2d 864 (4th Cir. 1983); United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980).

Rule 404(b) is a rule of inclusion, not exclusion. United States v. Percy, 765 F.2d 1199, 1203 (4th Cir. 1985); United States v. Masters, 622 F.2d at 85-86; United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978). Thus, "[t]he circumstances under which such evidence may be found relevant and admissible under [Rule 404(b)] have been described as 'infinite.'" Masters, 622 F.2d at 86. Indeed, the United States Supreme Court emphasized that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." Huddleston, 485 U.S. at 688-89. Rule 404(b) limits the admission of other acts evidence only if such evidence is offered solely to prove character. Huddleston, 485 U.S. at 688-89. When other acts evidence is offered for any purpose other than proving character, such evidence "is subject only to general structures limiting admissibility such as Rules 402 and 403." Huddleston, 485 U.S. at 687-88.

B. Other Acts Evidence Must Be Relevant  
To Be Admissible Under Rule 404(b)

Evidence is admissible under Rule 404(b) only if it is relevant. Huddleston, 485 U.S. at 689. Evidence of other acts is relevant "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Id. See also United States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Pursuant to Rule 104(b) of the Federal Rules of Evidence, the trial court is

required to examine all of the evidence in the case and decide whether the jury could reasonably find the conditional fact by a preponderance of the evidence -- here, that the defendants participated in bid rigging and price fixing activities outside the charged conspiracy. Huddleston, 485 U.S. at 690-91.

C. The Court Must Balance The Probative Value Of Other Acts Evidence Against The Potential For Undue Prejudice

After determining that the other acts evidence is relevant, the court must then balance the probative value of the other acts evidence against the possibility of prejudice. Smith Grading and Paving, Inc., 760 F.2d at 530; United States v. Lewis, 780 F.2d 1140, 1142 (4th Cir. 1986); United States v. Bice-Bey, 701 F.2d 1086, 1089 (4th Cir. 1983), cert. denied, 464 U.S. 837 (1986); United States v. Martin, 773 F.2d 579, 582 (4th Cir. 1985). The prejudice which Rule 404(b) is designed to prevent is "jury emotionalism or irrationality." United States v. Greenwood, 796 F.2d 49, 53 (4th Cir. 1986). In weighing the potential for undue prejudice, the court should consider the nature of the other acts evidence, i.e., whether it is of such a nature as to create a "'genuine risk that the emotions of the jury will be excited to irrational behavior . . . ." Percy, 765 F.2d at 1204 [quoting Masters, 622 F.2d at 87].

The court generally can obviate the potential of undue prejudice by giving appropriate cautionary or limiting instructions to the jury. United States v. Teague, 737 F.2d 378, 381 (4th Cir. 1984); cert. denied, 469 U.S. 1161 (1985); Lewis,

780 F.2d at 1142; Masters, 622 F.2d at 87-88. It is well settled that the court's decision to admit other acts evidence under Rule 404(b) is subject to an "abuse of discretion" standard of review and will be overturned only if the decision is irrational or arbitrary. Greenwood, 796 F.2d at 53-54; Masters, 622 F.2d at 87-88.

## II

### SUMMARY OF OTHER ACTS EVIDENCE THAT THE UNITED STATES INTENDS TO INTRODUCE AT TRIAL

Pursuant to Rule 404(b), the United States intends to introduce evidence that the individual defendants participated in substantially similar bid rigging and price fixing activities outside the charged conspiracy. This evidence will be introduced through the testimony of witnesses. A brief summary of the other acts evidence is described below.

#### A. Other Acts Evidence Relating To Defendant Dobbins

The United States intends to introduce evidence of defendant Dobbins' agreement with Ronald James Crowder of Coble Dairy to rig the 1986-87 school milk bid in Surry County, North Carolina. This evidence will be introduced through the testimony of Crowder. Crowder's testimony will establish that Dobbins contacted him before the Surry County bid for the 1986-87 school year was due and asked Crowder if everything was all right in Surry County. During this conversation, Dobbins told Crowder what price Meadow Gold was going to bid in Surry County. Crowder will testify that as the result of his conversation with

defendant Dobbins, Crowder bid above the price given to him by Dobbins to enable Meadow Gold to win that school bid. Crowder will testify that the purpose for this call was to rig the Surry County school milk bid for that year.

Crowder will testify further that Dobbins contacted him about the 1987-88 school bid in Surry County. Crowder will testify that Dobbins contacted him before the Surry County bid for the 1987-88 school year was due. Crowder will testify that the purpose of this call was to rig the Surry County school milk bid for that year.

B. Other Acts Evidence  
Relating To Defendant Garner

The United States intends to introduce evidence that defendant Garner was aware of and participated in a bid rigging and price fixing conspiracy while he was the general manager of the Flav-O-Rich, Inc. ("FOR") dairy processing plant in Columbus, Georgia. This evidence will be introduced through the testimony of William Randall Waters, the general sales manager of FOR's plant in Columbus, Georgia from 1982 until the plant was closed in late 1984 or early 1985. Garner became the general manager of the plant in Columbus, Georgia in 1982 and remained in that position approximately until the plant was closed. As general sales manager of this plant, Waters reported directly to Garner. Waters will testify that he was responsible for handling the plant's school milk bidding after Garner became the general manager. Waters also will testify that while Garner was the

general manager, Waters rigged school milk bids submitted by the Columbus, Georgia plant to school systems located in the states of Florida, Georgia and Alabama. Waters will testify that he became involved in rigging school milk bids only after Garner became the general manager. Waters will testify that Garner knew Waters was rigging school milk bids and did nothing to stop such activity.

C. Other Acts Evidence  
Relating To Defendant Woods

The United States intends to introduce evidence that defendant Woods instructed Ernest Allen to contact the manager of FOR's branch facility in Beckley, West Virginia about Heartland Nursing Home. This evidence will be introduced through the testimony of Ernest Allen. According to Allen, Heartland Nursing Home was a wholesale account serviced by Meadow Gold's plant in Beckley, West Virginia. Allen will testify that Woods, who was Allen's boss at this time, directed Allen on several occasions to contact FOR's branch manager (Dallas Connor) and ask him to withdraw FOR's price to Heartland Nursing Home. Allen will testify that he was reluctant to contact FOR's branch manager as instructed and that he never talked to Connor about Heartland Nursing Home. Woods ultimately told Allen not to worry about it because Woods instructed Sandy Rhoads to handle the situation. Allen will testify that this incident occurred in September 1984, shortly after Allen was replaced by Woods as the general manager of Meadow Gold's dairy processing plant in Beckley, West

Virginia.

### III

#### THE OTHER ACTS EVIDENCE PROFFERED IN THIS CASE SATISFY THE REQUIREMENTS OF ADMISSIBILITY UNDER RULE 404(b)

##### A. The Other Acts Evidence Is Relevant And Probative Of An Issue Other Than Bad Character

Evidence is admissible under Rule 404(b) as long as such evidence is offered for a purpose other than to prove bad character and is more probative than prejudicial. Smith Grading and Paving, Inc., 760 F.2d at 531. In the instant case, the other acts evidence is relevant to matters at issue other than bad character and is more probative than prejudicial. Indeed, evidence that the defendants engaged in other prior and contemporaneous bid rigging and price fixing activities is admissible under Rule 404(b) for the reasons discussed below.

##### 1. The Other Acts Evidence Is Admissible To Show The Individual Defendant's Knowledge And Intent

In Smith Grading and Paving, Inc., the Fourth Circuit affirmed the trial court's admission of evidence of prior and later acts of bid rigging, reasoning that the close relationship between the prior bid rigging activity and the charged offense was probative of the defendants' knowledge and intent to enter into the charged bid rigging conspiracy. Smith Grading and Paving, Inc., 760 F.2d at 531. Similarly, the close relationship between the other acts evidence and the charged offense in this case is highly probative of each defendant's knowledge and intent in entering into and participating in the charged conspiracy.

See e.g., Greenwood, 796 F.2d at 53 (prior bank loan misstatements and reimbursement cover-up scheme admissible to prove intent to defraud the government by submitting false reimbursement vouchers); United States v. King, 768 F.2d 586, 588 (4th Cir. 1985) (similar acts admissible to prove defendants knew how drugs were trafficked to show intent and absence of mistake); Percy, 765 F.2d at 1203-1204 (prior acts of cocaine distribution admissible to show background of charged conspiracy and to show defendant's acts not inadvertent or the result of mistake); Teague, 737 F.2d at 381 (prior attempt to sell a firearm admissible to prove intent and knowledge).

In the instant case, the charged conspiracy involves a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Although the United States is not required to prove that the defendants had a specific intent to engage in anticompetitive activity, the United States is required to show that the defendants knowingly entered into the charged conspiracy. United States v. United States Gypsum Co., 438 U.S. 422, 443-46 (1978). In this case, the other acts evidence is thus admissible under Rule 404(b) because it is highly probative in showing that the defendants knowingly entered into and participated in the charged conspiracy.

Significantly, the other acts evidence involves each defendant's participation in bid rigging and price fixing activities in the dairy processing and distribution industry while they were employed in positions with pricing

responsibility. In particular, the other acts evidence concerning defendants Dobbins and Woods involves their active participation in substantially similar conspiratorial activity that is contemporaneous with the charged conspiracy. Thus, the close relationship between the other acts evidence and the charged conspiracy is relevant and probative as to a matter at issue: the defendants' knowledge and intent in entering the charged conspiracy. Moreover, the other acts evidence establishes that the defendants' participation in the charged conspiracy was not the result of mistake or accident. See, e.g., Greenwood, 796 F.2d at 53 ("The existence of prior similar wrongdoings reduces the plausibility . . . of inadvertence or accident."); United States v. Naylor, 705 F.2d 110, 111-12 (4th Cir. 1983) (prior conviction for attempted theft of motor vehicle "admissible on the issue of knowledge and absence of mistake . . . since an essential element of this crime is defendant's knowledge that the vehicle was in fact stolen.") In addition, the other acts evidence in this case shows that Paul French and Ernest Allen were not mistaken in interpreting the defendant's charged acts as part of a bid rigging and price fixing conspiracy. Accordingly, the other acts evidence is admissible.

2. The Other Acts Evidence Is Admissible  
To Demonstrate A Common Plan Or Scheme

Evidence of other acts is relevant and probative to demonstrate a common plan or scheme. United States v. Nadler,

698 F.2d 995, 1000 (9th Cir. 1983); United States v. Billups, 692 F.2d 320, 328 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983). In the instant case, the prior and contemporaneous bid rigging and price fixing activity in which the defendants were involved "furnishes part of the context of the crime," and is "so intimately connected with and explanatory of the crime charged . . . that its proof is appropriate in order to complete the story of the crime on trial." Masters, 622 F.2d at 86 [quoting United States v. Smith, 446 F.2d 201, 204 (4th Cir. 1971) and United States v. Howard, 504 F.2d 1281, 1284 (8th Cir. 1974), respectively]. Significantly, the other acts evidence establishes that the defendants engaged in a pattern of conduct indicative of an ongoing intent to engage in the charged conspiracy. In particular, the other acts evidence concerning defendant Woods is intimately connected with the charged offense and explains the overall nature of the charged conspiracy. Moreover, the other acts evidence is helpful in understanding the defendants' motive in participating in the charged conspiracy. Accordingly, the other acts evidence is admissible.

3. The Other Acts Evidence Is Admissible To Explain The Background Of The Conspiracy

Evidence that the defendants engaged in other prior and contemporaneous bid rigging and price fixing activities in the dairy distribution and processing industry is relevant to an understanding of the background, development and workings of the charged conspiracy. It is well settled that other acts evidence

is admissible as background evidence. United States v. Richardson, 764 F.2d 1514, 1522-23 (11th Cir. 1985), cert. denied, 474 U.S. 952 (1985); United States v. Passarella, 788 F.2d 377, 384 (6th Cir. 1986); United States v. Bass, 794 F.2d 1305 (8th Cir. 1986), cert. denied, 479 U.S. 869 (1986).

The other acts evidence helps to explain how the charged conspiracy developed and why it was effective. The other acts evidence concerning defendant Dobbins places the charged conspiracy within the context of a contemporaneous bid rigging conspiracy in which Dobbins was involved. The other acts evidence concerning defendant Woods is inextricably interwoven with the charged conspiracy and shows its background. Accordingly, the other acts evidence is admissible.

B. The Other Acts Evidence Is  
More Probative Than Prejudicial

The other acts evidence which the United States seeks to introduce in this case is probative of several issues other than bad character. Moreover, the United States is confident that the testimony of the witnesses who will introduce the other acts evidence will support a finding that "a reasonable juror could find that the defendant[s] committed the prior act by a preponderance of the evidence." United States v. Kenny, 973 F.2d 339, 344 (4th Cir. 1992). See Huddleston, 485 U.S. at 689. Given the substantial similarity of the other acts evidence to the charged conspiracy, the probative value of the other acts evidence outweighs any possible prejudice to the defendants.

Smith Grading and Paving, Inc., 760 F.2d at 530. Certainly, the other acts evidence in this case is hardly the kind to raise a "'genuine risk that the emotions of the jury will be excited to irrational behavior . . . .'" Percy, 765 F.2d at 1204, quoting Masters, 622 F.2d at 87. Moreover, any possible risk of undue prejudice can be obviated by the court in giving appropriate cautionary or limiting instructions to the jury. Teague, 737 F.2d at 381; Lewis, 780 F.2d at 1142; Masters, 622 F.2d at 87-88. Accordingly, the other acts evidence is more probative than prejudicial and is thus admissible under Rule 404(b).

#### IV

#### THE DEFENDANTS HAVE HAD REASONABLE NOTICE OF THE UNITED STATES' INTENT TO INTRODUCE OTHER ACTS EVIDENCE IN THIS CASE

The defendants have been given adequate notice of the United States' intent to introduce other acts evidence in this case. In a letter dated April 8, 1993, the United States advised counsel for defendant Dobbins of its intent to introduce other acts evidence against his client. In a letter dated April 8, 1993, the United States advised counsel for defendant Woods of its intent to introduce other acts evidence against his client. In a letter dated April 28, 1993, the United States advised counsel for defendant Garner of its intent to introduce other acts evidence against his client. These letters, which are attached hereto as exhibits, describe the nature of the other acts evidence which the United States intends to introduce against the defendants. Accordingly, the defendants have been given

reasonable notice in advance of trial of the other acts evidence as required under Rule 404(b).

V

CONCLUSION

Based on the foregoing reasons, the other acts evidence proffered by the United States in this case is admissible under Rule 404(b).

Respectfully submitted,

"/S/."

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